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**The elephant in the room: Article 234 of the Law of the Sea Convention and the Polar Code as an incompletely theorised agreement**

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The International Maritime Organization's (IMO) International Code for Ships Operating in Polar Waters (Polar Code) is a new chapter in the regulation of Arctic shipping. This international legal instrument can affect the interpretation and practice of national coastal State legislation under article 234, the Arctic exception in the UN Convention on the Law of the Sea. Relying on documents from the IMO, this paper examines the negotiation of the relationship of these provisions to national legislation. It asks: how can coastal States implement the Polar Code while avoiding a resolution of the deep conflict between Arctic coastal State jurisdiction and freedom of navigation?

While early debates directly concerned article 234, the peculiarity of later discussions, which focus on savings clauses regulating relationships between instruments, was the lack of reference to this article's provisions. Agreement was possible due to indirect negotiation of this issue, through the use of second-

best arguments and analogies. It is submitted that precisely the lack of discussion and resolution of this issue allowed for the possibility of concluding the Polar Code. This qualifies the Polar Code as an incompletely theorised agreement in deliberative theory.

Polar Code; law of the sea; Arctic shipping; decision-making; negotiation process

## **Introduction**

The International Code for Ships Operating in Polar Waters (Polar Code), regulating for safety and pollution prevention in polar waters, was adopted by the International Maritime Organization (IMO) in November 2014 and May 2015.<sup>1</sup> While the Polar Code is a technical instrument, it seems it was unavoidable that the most challenging issue regarding Arctic shipping would find its way into the negotiations: namely, the question of unilateral coastal State national legislation based on the contentious article 234 of the United Nations Convention on the Law of the Sea (LOSC).<sup>2</sup> The Polar Code could not remain unaffected by this issue as, on the one hand, it could be seen as a vehicle to provide international legal basis for unilateral national regulations, notably from Canada and Russia, while on the other hand, it could also be seen as setting restrictions on the exercise of the rights contained in article 234 of the LOSC.<sup>3</sup> The IMO's goal of uniform and universal standards for ships, including in the Polar Code, thus comes into conflict with the unilateral exercise of rights in article 234.

The conflict of principles or values can prove an impediment in the creation of international agreements, especially in fora where decisions are not made by politicians, but

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<sup>1</sup> IMO, Res. MSC.385(94); and IMO, Res. MEPC.264(68).

<sup>2</sup> This Convention is referred to both as UNCLOS and LOSC in the literature and in practice. I use the latter, apart from in direct citations.

<sup>3</sup> For views on how the Polar Code and article 234 of the LOSC might affect each other in the future, see Fauchald, "Regulatory Framework"; Chircop, "Jurisdiction over Ice-Covered Areas"; Jensen, "International Code for Ships"; and Skodvin, "Arctic Shipping – Still Icy."

rather by delegates with a technical background.<sup>4</sup> The present article scrutinises the handling of the issue of coastal State legislation in Arctic ice-covered waters in the setting of the IMO's Polar Code negotiations<sup>5</sup> to answer the question: what can be learned from the case of the Polar Code about how a technical organisation deals with a politically charged conflict where deep-seated values clash?

In order to investigate the negotiation of such conflicts through the case of the Polar Code, I pose the question: how was the contentious issue of coastal State jurisdiction under LOSC article 234 dealt with? This analysis is based on deliberative theory, introduced in the next section. The main hypothesis put forward here is that the Polar Code should be seen as an *incompletely theorised agreement*, whereby agreement is reached without resolving the underlying conflict of principles. Agreement was possible when the parties avoided discussing LOSC article 234. Why was this needed, and how was this possible? The article follows with the examination of these questions. The analysis of the Code's negotiation allows for drawing more general conclusions on the way technical organisations, like the IMO, create international law in the face of deep value conflicts. The issue of the coastal State national legislation in the Polar Code negotiations highlights not only the way deep-seated conflicts are dealt with, but points more generally at the role of nation States vis-à-vis international regulation. These issues are discussed following the analysis of the Polar Code negotiations, while the last section offers concluding remarks.

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<sup>4</sup> In the case of the IMO, the reliance on technological expertise and delegates with technical background was documented in Silverstein, *Superships and Nation-States*, 35—45.

<sup>5</sup> While the Polar Code provides regulations for both Arctic and Antarctic waters, here the emphasis is placed on the Arctic, due to the special regime arising from The Antarctic Treaty, article IV. Furthermore, article 234 of the LOSC was fashioned for the conflict in the Arctic. For the negotiation of article 234, see McRae, "Negotiation of Article 234," 98—114; and de Mestral, "Article 234," 111—124.

## **Deliberative theory and incompletely theorised agreements**

To analyse the negotiation of the Polar Code, I use a theoretical framework based in deliberative theory. Classic deliberative theory draws a distinction between different modes of decision-making and contrasts deliberation and negotiation. This theory understands deliberation as being based on impartial and truthful reason-giving or arguing, aimed at reaching a common good, while negotiation is viewed as interest- and power-driven bargaining.<sup>6</sup>

Yet, it has also been acknowledged that deliberation and negotiation can be and often are complementary; they are not necessarily mutually exclusive.<sup>7</sup> The recognition of interests can and often should be incorporated so as to achieve a just outcome.<sup>8</sup> Many forms of so-called deliberative negotiation have been identified – a fusion of the incorporation of self-interest and the conflict of interests with the deliberative ideals of “mutual justification, respect, and reciprocal fairness.”<sup>9</sup>

The different forms of deliberative negotiation range between the two poles of pure deliberation and pure negotiation. One of these forms is incompletely theorised agreements,<sup>10</sup>

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<sup>6</sup> Elster, “Arguing and Bargaining,” 371—377; Mansbridge, “Deliberative and Non-Deliberative Negotiations,” 3—5; and Mansbridge et al., “Place of Self-Interest,” 66—67. In the present article, the use of the phrase “Polar Code negotiations” is not intended to imply that this process was dominated by bargaining.

<sup>7</sup> Mansbridge, “Deliberative and Non-Deliberative Negotiations,” 9—11; and Warren et al., “Deliberative Negotiation,” 92—93.

<sup>8</sup> Mansbridge et al., “Place of Self-Interest,” 72—80.

<sup>9</sup> Warren et al., “Deliberative Negotiation,” 92.

<sup>10</sup> For other forms of deliberative negotiation, see Warren et al., “Deliberative Negotiation,” 93a—98; Mansbridge et al., “Place of Self-Interest,” 69—72; and Mansbridge, “Deliberative and Non-Deliberative Negotiations,” 11—20.

a concept formulated by Cass Sunstein, who applied it to the US judiciary.<sup>11</sup> In the present researcher's view it is also applicable to other multi-member organisations representing diverse views, including the IMO and its agreements. The peculiarity of incompletely theorised agreements is that they reach an outcome but leave certain underlying issues unresolved. These underlying issues are typically conflicts of high-level principles, deeply held by the parties. Thus, while a practical outcome is achieved through mutual reason-giving – as well as a possible resolution of low-level principles that help generate the practical outcome – the entire issue is not resolved.<sup>12</sup> By being able to agree on low-level principles or a practical resolution, the parties can unite on an outcome in spite of “profound disagreements over ultimate foundations.”<sup>13</sup> In fact, one of the meta-principles, it is argued, is “that of leaving ultimate principles unresolved.”<sup>14</sup> Thus, participants can find a *modus vivendi* precisely because the fundamental but conflicting principles are not affected by the agreement.

The practical advantage of incompletely theorised agreements stems from participants not necessarily getting engulfed in lengthy and time-consuming debates about high-level principles, but instead focusing on practical and workable solutions. Thus, such agreements have the advantage of effective decision-making in the face of limited time and capacities.<sup>15</sup> Further, such agreements do not refute the deeply-held values of the participants. As such, even if the outcome is a loss to some parties, those parties not lose face as their principles are

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<sup>11</sup> Sunstein, “Incompletely Theorized Agreements,” 1733—1772; and Sunstein, *Legal Reasoning*, 35—61.

<sup>12</sup> Mansbridge et al., “Place of Self-Interest,” 71.

<sup>13</sup> Mansbridge, “Deliberative and Non-Deliberative Negotiations,” 12 (citing Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 58).

<sup>14</sup> Mansbridge et al., “Place of Self-Interest,” 71.

<sup>15</sup> Sunstein, “Incompletely Theorized Agreements,” 1749.

not outright rejected. Such agreements, therefore, allow for continued collaboration without unnecessary antagonism, and reduce the political costs to participants.<sup>16</sup>

### *Methods of reaching agreement*

How is it possible to arrive at an outcome to a dispute without resolving the underlying conflict of deeply held principles? Sunstein argues that this is possible by enlisting silence on fundamental questions.<sup>17</sup> Silence is used constructively, to direct the discussion to areas where cooperation is possible and disconnect negotiations from contested principles.<sup>18</sup> According to Sunstein, analogies and rules are the most important methods in this regard.<sup>19</sup> Both serve to provide fixed points on which the parties to a dispute can rely, without having to invoke high-level principles. Rules are agreed beforehand and thus “make legal judgments in advance of actual cases.”<sup>20</sup> Analogies provide similarities between the dispute at hand and already decided cases. Thus, a lower-level rationale explains the connection between the rule or analogy, on the one hand, and the case to be decided, on the other, while staying silent on issues that could hinder agreement.<sup>21</sup> This makes it easier for the losing party to agree to and comply with the outcome.

Another factor that makes it possible to avoid debate on high-level principles is the use of what I call *second-best arguments*. This approach facilitates agreement by

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<sup>16</sup> Ibid., 1746—1749.

<sup>17</sup> Sunstein, *Legal Reasoning*, 39; and Sunstein, “Practical Reason,” 267—268.

<sup>18</sup> See also Holmes, “Gag Rules.”

<sup>19</sup> See, for example, Sunstein, *Legal Reasoning*; and Sunstein, “Practical Reason.”

<sup>20</sup> Sunstein, *Legal Reasoning*, 21.

<sup>21</sup> This duality parallels Koskenniemi’s apology/utopia concept. Koskenniemi, *From Apology to Utopia*, 58. Koskenniemi identifies what he terms “utopia” — normativity seen as the impartial application of law — and “apology” — concreteness of State behaviour, will and interest — with the doctrine necessarily moving between the two.

misrepresenting the ultimate foundations at play, obscuring considerations that can be important and decisive in reaching an agreement.<sup>22</sup> The strategy of using second-best arguments hinges on the fact that sometimes it is better not to utter the real reasons behind a proposal. I base this idea on Jon Elster's strategic use of impartial arguments.<sup>23</sup>

Impartial arguments are used strategically when they are employed in favour of a proposal that is in the interest of one participant. If the use of self-interested reasoning is not likely to lead to agreement on such a proposal, it might be wise to use an impartial argument in order to achieve it.<sup>24</sup> Yet, there might not exist an impartial argument for the proposal, or the use of the impartial argument would be suspicious as it aligns too well with one party's self-interest.<sup>25</sup> In this case, what is needed is an impartial argument that can achieve as close an outcome to the original proposal as possible.<sup>26</sup> However, this maximal – as opposed to a perfect – fit would result in a somewhat diluted outcome.<sup>27</sup>

Elster lists several reasons why one party would choose to employ strategic use of impartial arguments.<sup>28</sup> One of these is mutual gain, where the stronger party avoids

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<sup>22</sup> This works similarly to Brennan and Buchanan's veil of uncertainty. Brennan and Buchanan, *The Reason of Rules*, 29–30. They posit that the likelihood of agreement increases the more general and permanent in time an agreed rule is, as this creates uncertainty about how that rule would impact States in the future. Accordingly, while second-best arguments obscure the ultimate principles of the parties, the veil of uncertainty shrouds how these might be affected by the agreement in the future. Also consider Koskeniemi (*From Apology to Utopia*, 590–591), who understands indeterminacy in international law as deliberately ambivalent “because it is based on contradictory premises and seeks to regulate a future” of unsettled preferences.

<sup>23</sup> Elster, “Strategic Uses of Argument,” 244–252.

<sup>24</sup> See *Ibid.*, 247–248 for Elster's list of reasons one might turn to impartial arguments.

<sup>25</sup> *Ibid.*, 245–246.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* See also *Ibid.*, 246 for Elster's example of the method to limit Jewish students' enrolment at Yale College in the 1920s.

<sup>28</sup> *Ibid.*, 247–248.

humiliating the weaker side and allows them to save face. Agreement is possible, but might not be the same as originally intended by the parties.

### **Is the Polar Code an incompletely theorised agreement?**

To analyse the Polar Code as an incompletely theorised agreement, I investigate two elements. First, there are underlying, deeply held but opposing principles at play. Second, the agreement is arrived at without a resolution to this conflict of principles.

Before I examine these two elements, I will first introduce the IMO and the Polar Code, together with the material on which my case is built. This will be followed by the introduction to the background of the conflict, providing a historical backdrop to the development of the Polar Code and a starting point for the analysis of underlying principles.

### ***The IMO's Polar Code process and the research material***

The IMO is a United Nations specialised agency, competent in the area of international merchant shipping, with a global membership of nation States and observers from the shipping industry and environmental non-governmental organisations.<sup>29</sup> The mandatory Polar Code was put on the agenda of the IMO in 2009 at the initiative of Denmark, Norway and the United States,<sup>30</sup> and aims to provide enhanced safety and pollution prevention for polar waters through additional regulations to the International Convention for Safety of Life at Sea (SOLAS)<sup>31</sup> and the International Convention for the Prevention of Pollution from Ships (MARPOL).<sup>32</sup> Accordingly, the Polar Code is made up of two main parts: Part I for safety and Part II for pollution prevention, the former made mandatory by the new SOLAS Chapter XIV,

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<sup>29</sup> For an introduction, see Chircop, “The International Maritime Organization.”

<sup>30</sup> MSC 86/23/9; and MEPC 59/20/1.

<sup>31</sup> International Convention for the Safety of Life at Sea.

<sup>32</sup> International Convention for the Prevention of Pollution from Ships.



the latter by new chapters in the MARPOL Annexes for which additional measures are included in the Code.<sup>33</sup>

The detailed, technical work on the Polar Code took place in the Sub-Committee on Ship Design and Equipment (DE) and its successor, the Sub-Committee on Ship Design and Construction (SDC).<sup>34</sup> These report on their work to the parent Committees, the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC), where mostly higher-level policy decisions are taken. Thus, SDC 1 sent the safety part of the Polar Code and SOLAS Chapter XIV to MSC, and the environmental part of the Code and the MARPOL amendments making it mandatory to MEPC, for further discussion, final approval and adoption. While the peculiarity of the Polar Code is that it relates to (and becomes mandatory through the tacit acceptance procedure under) both SOLAS and MARPOL,<sup>35</sup> therefore falling under the remit of both Committees, the usual IMO decision-making procedure was followed throughout the negotiations.

While the present analysis utilises secondary literature when highlighting the high-level principles in the case of the Polar Code negotiations, primary sources from the IMO were used to analyse the debates. Documents relating to coastal State legislation submitted to

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<sup>33</sup> These are: Annex I for the prevention of pollution by oil; Annex II for control of pollution by noxious liquid substances carried in bulk; Annex IV for the prevention of pollution by sewage; and Annex V for prevention of pollution by garbage.

<sup>34</sup> Due to the reform of the IMO's structure, DE 57 was followed by SDC 1. The meetings of the Committees and Sub-Committees are denoted by their abbreviation and the sequence number of the meeting.

<sup>35</sup> Under the tacit acceptance procedure, for an amendment to an IMO Convention to enter into force, there is no need to wait until a certain number of parties accept that amendment. Instead, the amendment enters into force unless there is a specific number of objections by a set date.

the above Committees and Sub-Committees were subjected to analysis, along with reports of these bodies.<sup>36</sup> Furthermore, interviews were conducted with delegates to the IMO.

### ***Case background***

Since the 1960s, the history of Arctic shipping regulation has been marred by the contest between freedom of navigation and coastal State jurisdiction, predating the LOSC and its article 234. U.S. vessels have tested both Canada's and the then Soviet Union's responses with regards to Arctic shipping.<sup>37</sup> The voyage with the greatest consequences for the international legal regime of Arctic waters was that of the SS *Manhattan* through the Canadian Arctic in 1969. Canada's decision to enact the *Arctic Waters Pollution Prevention Act* (AWPPA) a year later, incurred protests by the United States and the United Kingdom as unlawfully interfering with freedom of navigation. Canada's efforts to obtain international legal basis for AWPPA resulted in article 234 of the new LOSC, negotiated between 1973 and 1982.<sup>38</sup>

Article 234 is exceptional in the LOSC in that it provides Arctic coastal States with the right to unilaterally adopt regulations which are more stringent than those generally accepted

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<sup>36</sup> These documents are publicly available through the IMO's database, IMODOCS, after registration at <http://webaccounts.imo.org>. A working paper from the working group dealing with the details of the Polar Code, established at DE 55 by IMO, was accessed from the website of the Antarctic Treaty Secretariat, <http://ats.aq/>. This paper was attached to document ATCM XXXIV/IP-60.

<sup>37</sup> See, for example, Roach and Smith, *Excessive Maritime Claims*, 312—328.

<sup>38</sup> This article reads: "Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence." LOSC, article 234.

by the IMO. While article 234 provides functional jurisdiction to Arctic coastal States for the protection of their marine environment from vessel-source pollution, many of the provision's phrases are vague, leading to contested interpretations of its temporal, spatial and substantive scope, as well as its link to the regime of straits used for international navigation.<sup>39</sup> The most important questions for the present case are: how should the "due regard to navigation" condition, placed on article 234 rights, be interpreted; and what is the relationship between article 234 and the international straits regime? The international straits regime was created precisely to stop coastal States from using varying or more stringent standards than generally accepted international rules and standards (GAIRAS) to restrict passage through straits used for international navigation. Article 234 was negotiated specifically between the United States, Canada and the Soviet Union, with Canada wanting a special clause for pollution prevention for the Arctic and the United States aiming for acceptance of the new international straits regime. The Soviet Union, then the biggest Arctic coastal State, with sovereignty claims over its northern water areas, could not be left out of the negotiation.

Although article 234 has been hailed as a Canadian success and the Soviet Union/Russian Federation appears to have been satisfied with it,<sup>40</sup> its interpretation has not been resolved and conflicts have resurfaced from time to time.<sup>41</sup> Canada and Russia are the

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<sup>39</sup> See, for example, McRae and Goundrey, "Environmental Jurisdiction"; Bartenstein, "Arctic Exception," 28—32; Friisk, "Arctic Coastal State Jurisdiction," 14—22; and Molenaar, "Options for Regional Regulation," 276—278. On the Canadian-US debate about whether the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) are within the scope of LOSC art. 234, see McDorman, "Canada, the United States," 263—266; and Kraska, "Northern Canada Vessel Traffic."

<sup>40</sup> It has been suggested that the Soviet Union/Russia is in a better position than Canada to defend its views regarding the status of the waters north of its coast. See Chircop et al., "Course Convergence," 325; and Zou, "Comparison of Arctic Navigation," 293—295.

<sup>41</sup> To provide further basis for their proclaimed sovereignty and full control over shipping, both Canada and Russia used straight baselines to claim internal waters. The international legality of both has been disputed. See, for example, McDorman, "Canada, the United States," 258—259; and

only Arctic coastal States to have enacted legislation cognisant of article 234.<sup>42</sup> Both Canadian and Russian legislation regarding control over shipping has been criticised as more excessive than that allowed by international law.<sup>43</sup> Accordingly, both of these States endeavoured to use the Polar Code to buttress their claims in international law.

### ***Conflict of deep-seated principles***

The questions surrounding LOSC article 234 and, by extension, the debate that took place in the IMO, are concerned with the extent to which coastal States can control shipping in ice-covered areas. As the areas in question are the Northwest Passage and the Northeast Passage/Northern Sea Route (NSR),<sup>44</sup> article 234's interpretation is intertwined with its relationship with navigational rights applicable to straits used for international navigation. Seemingly, therefore, conflict in this case is between the principles of the freedom of navigation and creeping coastal State jurisdiction. But what are the even deeper ideas lying behind these two?

Freedom of navigation has been the cornerstone of the law of the sea since Hugo Grotius' *Mare Liberum* (1609), where freedom of seas required unhindered navigation. While different coastal maritime zones have since been introduced, navigational freedom is still applicable on the high seas and in the exclusive economic zone (EEZ), and is reflected in the

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Scovazzi, "Baseline of the Territorial Sea," 82—83. Despite claiming internal waters, Canada sought to justify its mandatory NORDREG on the basis of article 234. See MSC 88/11/3; and MSC 88/26/Add.1, Annex 27.

<sup>42</sup> On the Russian view regarding article 234, see Dremljuga, "A Note."

<sup>43</sup> Chircop et al., "Course Convergence," 326; Brubaker, "Straits in the Russian Arctic"; and Roach and Smith, *Excessive Maritime Claims*, 467—506.

<sup>44</sup> The Northern Sea Route, a concept introduced in Soviet legislation, stretches from Novaya Zemlya to the Bering Strait.

right to unimpeded transit passage to all ships through international straits.<sup>45</sup> Thus, freedom of navigation is safeguarded, although curtailed slightly in the maritime zones by coastal State rules that must conform to GAIRAS. In regard to the Arctic, experts from the United States – as well as international shipping organisations – have argued that the international straits regime applies in the Arctic passages, over the regime created by article 234.<sup>46</sup> In any case, article 234's condition of "due regard to navigation" is also meant to safeguard the interests of maritime States.

The rationale behind the preservation of freedom of navigation in the case of international straits and ice-covered waters lies, on the one hand, in the liberal international world order, its underpinning in free trade and, following from this, its interconnected economy, as most of the world trade is carried by international merchant ships.<sup>47</sup> It is in the interest of the global community and, more narrowly, of the major flag States and States with large interests in seaborne trade, to ensure unobstructed passage of vessels and to curtail creeping coastal State jurisdiction.

On the other hand, freedom of navigation is important from the global security perspective.<sup>48</sup> This requires maintenance of the capacity to operate through the world's straits, both for commercial vessels and for the U.S. Navy, as the United States fears a possible precedence stemming from the Arctic for other areas of the world oceans. As Bernard Oxman notes:

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<sup>45</sup> LOSC, Part III.

<sup>46</sup> Kraska, "Law of the Sea"; Roach and Smith, *Excessive Maritime Claims*, 478–479; and International Chamber of Shipping, "Position Paper," 5.

<sup>47</sup> It has been highlighted that Grotius's aim when establishing the freedom of seas was protection of the trade rights of the Netherlands. See, for example, Pinto, "Hugo Grotius," 27–28; and Young, "Then and Now," 172.

<sup>48</sup> Pinto, "Hugo Grotius," 39–40.

[t]he Arctic is important ... as one object of the overall platform of principle maintained with respect to the freedoms and rights of navigation and overflight of all states throughout all the seas and oceans of the world.<sup>49</sup>

Thus, the freedom of navigation and overflight is, and was especially in the Cold War era, linked to security and the United States' role as the world's policeman.

Meanwhile, coastal State jurisdiction is intrinsically connected to many important concepts. First, it can be linked to the idea of stewardship, the protection of the marine environment. This is especially so in the Arctic, where the Canadian legislation emerged from concerns about the impact of increased Arctic shipping on the fragile environment. LOSC article 234 provides functional jurisdiction to the coastal State precisely for environmental protection purposes. Coastal State jurisdiction can then be seen as conflicting with the unfettered "traditional doctrine on freedom of the seas."<sup>50</sup>

In the case of the Russian and Canadian Arctic, the exercise of coastal State jurisdiction has been intertwined with the notions of sovereignty and identity. Control over their Arctic waters has been the focal point of the northern identities of these States. The idea of Canadian sovereignty over its Arctic Archipelago was an important factor in the wake of the SS *Manhattan*,<sup>51</sup> and has remained a discourse in Canadian politics ever since, while the Arctic has an enduring significance in Russian identity.<sup>52</sup> Further, it was highlighted that the parties had to tread carefully during the negotiation of article 234 as the Soviet Union would not accept anything that would compromise its position of full sovereignty in the Arctic.<sup>53</sup> Today, the Arctic is seen as crucial to Russia's national revival, closely connected to the

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<sup>49</sup> Oxman, "Canada's Arctic Waters," 197.

<sup>50</sup> McRae, "Negotiation of Article 234," 101.

<sup>51</sup> Kirton and Munton, "Manhattan Voyages."

<sup>52</sup> See, for example, Hønneland, *Russia and the Arctic*, 31—36.

<sup>53</sup> McRae, "Negotiation of Article 234," 109—110. Also see McRae's endnotes 32 and 36 (*Ibid.*, 285—286).

issues of security, nuclear capability and great power status.<sup>54</sup> Furthermore, the vastness, remoteness and, thus, vulnerability of the Russian Arctic also appear to justify security concerns and eagerness to exert control over shipping.<sup>55</sup>

To sum up, for the United States and major flag States, freedom of navigation, as based on the principles of liberal international world order and global security, is decisive when it comes to regulation of Arctic shipping. For Canada and Russia, coastal State jurisdiction is essential, as it rests on the notions of stewardship, sovereignty, identity and national security. It is helpful to borrow an observation from Ted McDorman who points out that the United States sees the Northwest Passage from a global perspective, while Canada views it as a local issue.<sup>56</sup> This logic can also be extended to Russia, which sees the NSR as its national waterway, its own backyard.<sup>57</sup> These perspectives, along with freedom of navigation and coastal State jurisdiction, point in opposite directions.

### ***Agreement without resolution to the underlying conflict***

Having established the underlying conflict of principles regarding Arctic shipping, it is now time to turn to the Polar Code negotiations. In order to structure the analysis, I broke the debates into two sections. The first ran from the beginning of the negotiations up to and including DE 56, while the second started with SDC 1. The second section also includes debates at MSC and MEPC.

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<sup>54</sup> Laruelle, *Russia's Arctic Strategies*, 39—40; Zysk, “Russia Turns North, Again,” 455; and Sergunin and Konyshchev, *Russia in the Arctic*, 144.

<sup>55</sup> Laruelle, *Russia's Arctic Strategies*, 123—124; and Sergunin and Konyshchev, *Russia in the Arctic*, 91.

<sup>56</sup> McDorman, “Canada, the United States,” 259.

<sup>57</sup> Zou, “Comparison of Arctic Navigation,” 297—298.

### *Debates on article 234 and DE 56's decision*

There were early indications from the DE 53 meeting in 2010 – the first Sub-Committee meeting to discuss the mandatory Polar Code – that the question of coastal State jurisdiction would be an issue. Canada submitted a draft text that included a provision declaring that “the Code is not intended to infringe on national systems of shipping control,”<sup>58</sup> while Denmark expressed support for ensuring the right to freedom of navigation and for the Polar Code’s regulations to supersede national regulations.<sup>59</sup>

Article 234 was first touched upon in a Russian document to DE 55 arguing for a “principle of priority of national regulations over the Code’s requirements,”<sup>60</sup> and aiming at reinstating the provision from the Canadian draft mentioned above, which had since been removed. This proposal was explicitly based on coastal State rights in article 234, but cited article 234 without its second sentence containing the duties of coastal States, such as “due regard.” The report of DE 55 shows there was fierce opposition to the Russian proposal and to a Canadian paper referring to coastal States’ systems of navigational control and the possibility of requiring ships to regularly report to the coastal State.<sup>61</sup> DE 55’s report highlights the concerns of the United States over the possible implications of these proposals:

With regard to documents DE 55/12/7 ... and DE 55/12/23 ..., the delegation of the United States expressed concern ..., reminding the Sub-Committee of ongoing concerns over the legal basis ... of Canada’s mandatory ship reporting and vessel traffic service system and the Russian Federation’s regulations and requirements for ships navigating along the Northern Sea Route in their claimed Arctic waters ... The United States, supported by several delegations, also expressed doubts regarding the application of

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<sup>58</sup> DE 53/18/2, Annex, 7.

<sup>59</sup> DE 53/18/5, 2.

<sup>60</sup> DE 55/12/23, 2.

<sup>61</sup> DE 55/12/7.



UNCLOS article 234 by Canada and the Russian Federation, or that the Polar Code in itself would provide the international legal basis for these systems.<sup>62</sup>

These delegations appear to have questioned several things: the reliance on article 234 by Russia and Canada; the extent and scope of national regulations based on article 234; and the possibility that the Polar Code would provide international legal basis for those national regulatory systems. While it is unclear which other delegations are referred to in DE 55's report, the report of the working group established at DE 55 to work out details of the Polar Code indicates that the Bahamas, China and Panama, along with the United States, were not in favour of including the proposed Russian provision in the Polar Code.<sup>63</sup> These are major flag States, while China has also been touted as a major future user of Arctic shipping routes.

While the provision proposed by Russia was included in the draft Polar Code, the working group decided not to discuss the preamble of the Code, but rather embark on the technical parts of the Code.<sup>64</sup> The controversial nature of this issue is shown by the fact that the non-infringement clause was taken out of the draft text between DE 55 and DE 56, leaving only a provision declaring that the Polar Code should not conflict with the LOSC and other international instruments.<sup>65</sup> Later Russian and Canadian submissions, referencing limitations imposed on navigation by coastal States,<sup>66</sup> were also greeted with concern. In this regard, the Sub-Committee reiterated that

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<sup>62</sup> DE 55/22, 24.

<sup>63</sup> DE 55/WP.4, 3.

<sup>64</sup> Ibid., 2.

<sup>65</sup> This clause read: "Nothing in this Code shall be taken as conflicting with the United Nations Convention on the Law of the Sea, 1982, the Antarctic Treaty System and other international instruments applicable to polar waters." DE 56/10/1, Annex 1, 5. According to a Canadian expert, this can be seen as more of an interpretative language that does not provide unambiguity as to the priority of the LOSC over the Code. See McDorman, "Note on the Potential," 156.

<sup>66</sup> DE 56/10/14; DE 56/10/15; DE 56/10/16; and DE 56/10/17.

the working group should consider only technical matters at this time, while legal issues could be considered at a later point in time.<sup>67</sup>

This is, in effect, an attempt to reach agreement on the Code's technical provisions, without deciding on the underlying conflict regarding article 234. Thus, seeing the differences between the parties on how to interpret article 234 and the rights of the coastal State provided therein, the Sub-Committee agreed to solve technical issues without discussing and adjudicating on this deep and political conflict. That this part of the debate relating to article 234 dealt explicitly with this article and the concerns of the different States is significant. The openness and directness at the DE meetings made a consensus agreement on the issue even more difficult, potentially jeopardising the Polar Code.

The decision to focus on technical details is a matter of practicality as well. Instead of spending precious time on contentious legal issues, the Sub-Committee felt it was more important to develop the Code's technical provisions, on which agreement might be easier and more forthcoming. It is precisely the possibility of agreeing on technical matters that shows that reaching agreement on the lower-level issues might not need an agreement on higher-level principles.

Yet, the door was not closed entirely at DE 56, and left open the possibility of consideration of legal issues later in the process.

#### *Enter the elephant: proposed savings clauses for SOLAS and MARPOL*

When the issue of article 234 of the LOSC returned to the agenda two years after DE 56's decision, in 2014, it happened in a more circumspect way, revolving around so-called savings clauses. Such clauses serve to clarify the relationship between different international legal

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<sup>67</sup> DE 56/25, 25.

instruments, and the rights and duties they contain.<sup>68</sup> As such, savings clauses are important when considering the relationship between the Polar Code and LOSC article 234.

While an interpretative clause was already included in the preamble of the draft Polar Code, Canada suggested the inclusion of a savings clause in both the new SOLAS Chapter XIV and the new chapters in the relevant MARPOL Annexes making the Polar Code mandatory.<sup>69</sup> In its final adopted form, the Code's preamble no longer contains such a clause. Canada did not succeed on the MARPOL amendments, but SOLAS Chapter XIV does now include a very general savings clause.<sup>70</sup>

*Savings clauses in the MARPOL Annexes.* Canada first proposed a savings clause for each of the MARPOL Annexes with relevance to the Polar Code during SDC 1 in 2014,<sup>71</sup> which was also supported by Russia.<sup>72</sup> One peculiarity of the proposed clause is that it does not mention article 234 of the LOSC. While this could reflect a general concern for the relationship between the Polar Code and international law, it is telling that Canada pursued the inclusion of the savings clauses over the course of several meetings. The reference to “the broader international legal framework applicable in polar waters”<sup>73</sup> and to the LOSC, can only mean article 234. This implies upholding Canada's and, more generally, coastal States' perceived rights in article 234.<sup>74</sup> It appears that Canada was so concerned for the inclusion of

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<sup>68</sup> As Axelrod shows, acknowledging prior agreements is not out of the ordinary, as savings clauses are frequently used to manage interplay between regimes. See Axelrod, “Savings Clauses.”

<sup>69</sup> SDC 1/26, Annex 10, 3; MEPC 66/11/7; and MSC 93/10/12.

<sup>70</sup> This clause reads: “Nothing in this chapter shall prejudice the rights or obligations of States under international law.” SOLAS, Chapter XIV, Regulation 2.5.

<sup>71</sup> See reference to this in SDC 1/26, 9 and Annex 10, 3.

<sup>72</sup> MEPC 66/11/7, 2.

<sup>73</sup> MSC 93/10/12, 2.

<sup>74</sup> The same conclusion was reached by Roach, “Polar Code.”

such a clause in the MARPOL amendments that it was willing to change the wording of the proposed clause to accommodate other delegations.<sup>75</sup>

The main argument used by Canada for the inclusion of savings clauses in the MARPOL Annexes was the need for legal clarity between the Polar Code and the LOSC, seemingly aiming for transparency, clarity and coherence. Several counter-arguments were voiced to the Canadian call for legal clarity. The existence of a general savings clause in MARPOL article 9(2) was mentioned,<sup>76</sup> as was the opinion that States did not expect a clash between the Code and “other relevant international law”<sup>77</sup> – a very general term that could encompass more than the LOSC, but would also include its article 234. Further, it was suggested that, instead of achieving enhanced clarity, the inclusion of savings clauses in the MARPOL Annexes would lead to confusion and legal uncertainty.<sup>78</sup> This might be due to the fact that at the time there was still an interpretative clause in the preamble in the Code.<sup>79</sup> Canada’s argument in this respect was that, unlike the Code’s preamble,<sup>80</sup> savings clauses in the text of the MARPOL Annexes would be legally binding thus giving the savings clauses a stronger position and effect.

Ultimately, MEPC 66, also in 2014, decided that no savings clause was to be included in the MARPOL amendments. In acquiescing to the decision of MEPC 66, Canada requested

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<sup>75</sup> SDC 1/26, Annex 10, 3. While the original text of the proposed savings clause is not available, there is no indication that article 234 was ever mentioned in its text (see SDC 1/26, 9).

<sup>76</sup> MEPC 66/21, 54. Also see reference to article 9(2) in Canada’s statement in SDC 1/26, Annex 10, 3. Article 9(2) is a general clause, found outside of MARPOL’s Annexes, stating that nothing in MARPOL “shall prejudice the codification and development of the law of the sea ... nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.” MARPOL, article 9(2).

<sup>77</sup> MEPC 66/21, 54.

<sup>78</sup> Ibid.

<sup>79</sup> SDC 1/26, Annex 3, 4.

<sup>80</sup> MEPC 66/11/7, 2.

that the reason for this be expressly stated, and highlighted that it “can go along with” MEPC’s decision based on

the view of this Committee that all IMO instruments are to be interpreted in a manner that would not prejudice or impair States’ rights and obligations under international law as reflected in UNCLOS.<sup>81</sup>

While Canada also mentioned the existence of article 9(2) of MARPOL, the view that LOSC cannot be impaired by the Polar Code appears to have carried more weight in convincing Canada to abandon the MARPOL savings clauses, as Canada had previously dismissed the importance of MARPOL article 9(2).<sup>82</sup>

*Savings clause for SOLAS Chapter XIV.* At the same time as the savings clauses for the MARPOL amendments were debated, delegations also considered two options for a savings clause in the new SOLAS Chapter XIV that makes the Code’s safety part mandatory.<sup>83</sup> There were several differences between the two options. Option 1 contained legally binding language, using the “nothing ... shall prejudice” phrase, while option 2 was of a more interpretative character, suggesting that the Code is not “intended to imply a change in the rights and obligations” of States. Further, option 2 used the common formula of “rights and obligations.” However, option 1 included the phrase “rights or jurisdiction.” While option 1 was chosen by the parties during the debate at SDC 1, interestingly, this phrase was changed to “rights or obligations” in the final report of the Sub-Committee:

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<sup>81</sup> MEPC 66/21, Annex 20, 12.

<sup>82</sup> SDC 1/26, Annex 10, 3.

<sup>83</sup> SDC 1/J/6, 2; and SDC 1/26, 11.

nothing in this chapter 1 of the Code shall prejudice the rights or obligations of States under international law, as reflected in the 1982 United Nations Convention on the Law of the Sea.<sup>84</sup>

This made the text very similar to that proposed by Canada for the MARPOL Annexes.<sup>85</sup> That the phrase “rights or jurisdiction” was changed to “rights or obligations” is significant. First, Canada claims functional jurisdiction over its Arctic waters pursuant to article 234. Secondly, the “rights or jurisdiction” version excludes reference to duties stemming from LOSC; for example, the obligation to show due regard to navigation when exercising rights in article 234. On both counts, the change of language might have proved more palatable to the parties.

That one version of the savings clause, especially the one with the more legally binding language, was accepted suggests that there was more support for that than for the savings clauses proposed for the MARPOL Annexes. However, significant opposition to the inclusion of any savings clause is registered in the report of SDC 1.<sup>86</sup> This is even more puzzling as the proposed clauses for SOLAS and the MARPOL Annexes used very similar language, prompting the question: what made the difference between the two cases?

While SDC included the savings clause in the draft SOLAS chapter, this was only in square brackets, meaning that this was not a final decision.<sup>87</sup> Debate on this issue resumed at MSC 93, a month after MEPC 66. Thus, Canada knew that stronger argumentation was needed to achieve the inclusion of a savings clause into SOLAS than in the case of the MARPOL Annexes. Both Germany and Canada submitted proposals to MSC 93; the former

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<sup>84</sup> SDC 1/26, 11.

<sup>85</sup> Canada’s proposal for the MARPOL Annexes read: “Nothing in the Polar Code shall prejudice the rights or obligations of states under international law as reflected in the 1982 UN Convention on the Law of the Sea.” Ibid., Annex 10, 3.

<sup>86</sup> Ibid., 11.

<sup>87</sup> Ibid., Annex 2, 2.

opposed the inclusion of the savings clause,<sup>88</sup> while the latter supported it.<sup>89</sup> Germany argued that the IMO instruments cannot impair rights and obligations under the LOSC and that there is already a savings clause in the preamble of the Polar Code.<sup>90</sup> At the same time, Canada, beyond concerning itself again with legal clarity, also cited several precedents to savings clauses being included in SOLAS chapters and other recent IMO conventions, and especially highlighted the case of the International Ship and Port Facility Security Code that was, like the Polar Code, incorporated into SOLAS by reference.<sup>91</sup>

One big difference between the MARPOL and SOLAS Conventions was likely to be on the parties' minds during the debate. The main MARPOL text contains a general savings clause – article 9(2) – providing priority to the LOSC. However, SOLAS does not have a similar overarching clause in favour of the LOSC. Instead, one can only find separate savings clauses in different chapters of SOLAS that were seen as possibly conflicting with the LOSC.<sup>92</sup> Thus, the savings clause already found in MARPOL could serve as a fall-back option for Canada, especially together with the expressed understanding at MEPC. The absence of a general savings clause and fall-back option in SOLAS is one explanation for Canada's more extensive argumentation, based on analogies, in the SOLAS case.

As the final adopted text of SOLAS Chapter XIV contains a savings clause – albeit a very general one, referring only to international law – it can be surmised that the more extensive Canadian argumentation and the lack of an overarching savings clause in SOLAS managed to convince the opposing parties. This resulted in reaching a majority of support for

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<sup>88</sup> MSC 93/10/2, 3.

<sup>89</sup> MSC 93/10/12.

<sup>90</sup> MSC 93/10/2, 3.

<sup>91</sup> MSC 93/10/12.

<sup>92</sup> As McDorman notes, the lack of a general savings clause in SOLAS is due to the fact that “much of what is covered in the SOLAS Convention is far removed from the LOS Convention.” McDorman, “Note on the Potential,” 152.

the SOLAS savings clause. While the opinions of the other member States, with the exception of Germany, are unknown, strong dissenting opinion would have been recorded in the report of MSC 93, as with the position of the United States during the DE 55 debates. In the case of the United States and the other Arctic coastal States, Norway and Denmark, one can also point to the possibility that these States could benefit from a savings clause with regard to their own coastal State legislation.<sup>93</sup> In this regard, it is important to note that the debates on the savings clauses did not refer to existing national regulations, while the savings clauses merely uphold the potential for these Arctic coastal States to exercise their rights under LOSC article 234.

### *Article 234 as the elephant in the room and how it could be overcome*

It is remarkable that article 234 of the LOSC was not mentioned during the discussions on the savings clauses. It was, however, clear that what was at stake was upholding the rights in article 234 since, as Canada stated, the savings clauses would provide for an informed application of the Polar Code's requirements within the legal framework that exists for polar waters.<sup>94</sup> This being clear, how could the debates on the savings clauses overcome similar polarisation to that encountered at the DE meetings?

First, rules played some role in the debate on the savings clauses relating to the Polar Code; that is, when and whether a savings clause is needed. Most important here is that the Vienna Convention on the Law of Treaties contains a rule specifically on savings clauses and

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<sup>93</sup> Brubaker has observed that the United States' 1990 Oil Pollution Act shows similarities to Russian and Canadian legislation regarding Arctic shipping. Brubaker, "Straits in the Russian Arctic," 277—279; and Brubaker, "Arctic – Navigational Issues," 72—75. For an evaluation of the legislation governing waters around Svalbard (Norway) and Greenland (Denmark) in light of article 234, see *Ibid.*, 77—95.

<sup>94</sup> MEPC 66/11/7, 2; and MSC 93/10/12, 2.



treats them as one method of determining rights and obligations in successive treaties regulating the same subject matter.<sup>95</sup> Thus, there is a rule that lays down when there is a need for savings clauses. Hence, even though there were debates on the savings clauses regarding the Polar Code, savings clauses in themselves are not new, rare or exceptional. Savings clauses only become an issue if they entail the discussion of emotional, deep-seated principles.<sup>96</sup> Therefore, the debates on the savings clauses regarding the Polar Code were not caused simply by the savings clauses themselves but by what they were intended to regulate. It is the controversial nature of article 234 that caused the debate, not the savings clauses themselves.<sup>97</sup> As witnessed by the DE debates, the issue of article 234 and coastal State jurisdiction could have become a major impediment to the work on the Polar Code. Obscuring this issue, then, contributed to reaching an agreement. The decision not to discuss the matter is significant in this regard.

Second, the parties utilised second-best arguments, not just to put the issue on the table again, but also to keep it there and reach agreement by obscuring fundamental principles. This approach was followed by the other States as they aimed to rebuff Canada's

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<sup>95</sup> This article reads: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Vienna Convention on the Law of Treaties, article 30(2).

<sup>96</sup> This was highlighted in the case of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which also included a discussion on a savings clause, causing a clash between environmental and cultural preferences on the one hand, and trade on the other. Safrin's conclusion in this case is that "the issue may be reframed into the overarching and perhaps unanswerable question of which set of important international goals ... holds greater import." Safrin, "Treaties in Collision," 622.

<sup>97</sup> As Koskeniemi suggests, hiding the indeterminacy of international law has often been done by relying on procedural norms States need to follow to reach agreement (in this case, the savings clauses), rather than resolving conflicts outright. Koskeniemi, *From Apology to Utopia*, 473. For his example regarding LOSC, see Koskeniemi, *From Apology to Utopia*, 488—497.

second-best arguments, instead of the underlying principles. Thus, instead of mentioning article 234, substitutes were used, such as “international law as reflected in UNCLOS.” Concerns were further clad in the language of legal arguments not directly related to article 234, centring instead on questions of need and legal clarity. Yet, as suggested by Elster,<sup>98</sup> the use of second-best arguments restricted the ability of the parties to achieve the entirety of their goals as they needed to yield to more convincing arguments.

Third, analogies were brought in by Canada to buttress its position without engaging in a debate directly on coastal State jurisdiction. Analogies are discussed by Sunstein as one of the methods used to achieve incompletely theorised agreements. Canada cited concrete examples where specific savings clauses were included in SOLAS and other international agreements.<sup>99</sup>

Fourth, the increasingly general language of the proposed clauses is also significant. It appears that the more general, and less focused on article 234, the language of the clauses was, the more acceptable they became. The principle of priority of national regulations was the most controversial and it was swiftly removed from the text of the draft Code. At the same time, the more general clause declaring that the Code “shall not be taken as conflicting with the United Nations Convention on the Law of the Sea, 1982, the Antarctic Treaty System and other international instruments applicable to polar waters” was retained in the preamble of the Code.<sup>100</sup> Similarly, in the SOLAS savings clause, placed in a stronger position than the Code’s preamble, the original reference to the LOSC proposed by Canada was changed to

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<sup>98</sup> Elster, “Strategic Uses of Argument,” 245—246.

<sup>99</sup> MSC 93/10/12.

<sup>100</sup> DE 56/10/1, Annex 1, 5.

merely “international law.”<sup>101</sup> Thus, the final version of the savings clause in SOLAS has the widest and most general language of those proposed, as well as the strongest position.

The disconnect between principles and arguments brought along by both sides thus served to obscure and circumvent the reference to article 234 and make it more palatable for the losing side to go along with the outcome, albeit reluctantly. This is evident from Canada’s statement attached to the report of MEPC 66. While Canada acknowledged the importance of the understanding that the Polar Code should not impair States’ rights and obligations in the LOSC, the statement clearly declares:

As the purpose of Canada’s proposal was to enhance clarity and transparency in this regard, Canada can go along with the decision of this Committee on this issue.<sup>102</sup>

It is important to note the significance of the framing provided by the second-best arguments. Without these, neither rules, analogies nor generality of language could have proved sufficient to elicit agreement between the parties. Comparison between the DE debates and later discussions highlights that the main contention, the underlying conflict of principles, could only be managed by being circumnavigated. Framing the issue with reference to need for legal clarity allowed the parties to agree to the outcome.

Without incomplete theorisation, then, the Polar Code negotiation could have become stalled and run into protracted troubles. Thus, Sunstein’s submission that incomplete theorisation can lead to agreement between parties holding contradictory values and principles appears valid in the case of the Code.

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<sup>101</sup> SOLAS, Chapter XIV, Regulation 2.5. A reference to “international law” as opposed to the LOSC was probably also preferable since the United States is not party to the LOSC but views most of its contents as reflecting customary international law.

<sup>102</sup> MEPC 66/21, Annex 20, 12.

## **Lessons from the case of the Polar Code**

The negotiation of the Polar Code, while complicated by its incorporation into two Conventions, was not out of the ordinary. Procedurally, the same IMO process was followed as for any other IMO output, through the work of different Committees, Sub-Committees and working groups. What is more interesting is how the overtly political issue of coastal State jurisdiction was handled by this technical organisation, and what this means for the future.

### ***Avoiding conflict and what it means for decision-making***

The IMO handled the issue arising from article 234 by avoiding it. This first became evident when the decision was made not to discuss the matter during the early stages of the Code's development. While this allowed parties to return to the issue in the later stages, it served to provide time and opportunity to discuss the substantive technical details of the Code's regulations. Furthermore, it signalled to the parties that, given the deep concerns of both sides, more effort was needed if they wanted to reach a favourable outcome on the question of coastal State jurisdiction. Secondly, this avoidance meant the debate on the savings clauses was framed through the use of second-best arguments, rather than high-level principles.

Incompletely theorised agreements make it possible to reach agreement in a timely and respectful manner, making continued work among the participants possible. This is an important factor in the case of the IMO, as many of the delegates meet multiple times a year, representing their respective States in different Committees and Sub-Committees. Keeping relationships cordial is essential for continued collaboration.

Finally, consensus is necessary in the IMO's procedure for reaching agreements, while entry into force through the tacit acceptance procedure requires a certain amount of support – or, rather, lack of objections. Since the Polar Code process followed the IMO's procedures, its adoption and entry into force were helped by an outcome that all parties could support. The

continued ambiguity on the issue of coastal State jurisdiction and, therefore, the possibility of the different parties agreeing to the outcome, contributed to achieving the necessary support across the parties.

### ***Avoiding conflict and the Polar Code's future***

While the avoidance of a clear-cut solution to the Polar Code's relationship with the LOSC might have had a positive effect on the Code's timely completion and the continued work of the delegates, it could raise questions as to the substance and future of the Code.

Firstly, it can be argued that the IMO's decision-making procedures weathered the test posed by the Polar Code. The legitimacy this provides to the Code can lead to greater acceptance and adherence to the Code and an increased willingness for its further development.

“Working around” a controversial political issue without solving it can often make an agreement possible and result in practicable solutions. Sabrina Safrin points to the case of the Cartagena Protocol on Biosafety where the issue of whether global trade or environmental and cultural concerns would triumph was avoided through a curious arrangement of a savings clause followed by two other clauses negating its effect.<sup>103</sup> Meanwhile, Oran Young suggests that the “existence of unresolved jurisdictional issues need not become an insuperable impediment to success,”<sup>104</sup> pointing at the case of the fisheries regime in the Barents Sea between Norway and Soviet Union/Russia that operated for decades without a resolution to a maritime boundary. He explains that instead of resolving such conflicts, regimes can be effective by “merely” managing them. This links the Polar Code to other instances of

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<sup>103</sup> Safrin, “Treaties in Collision.”

<sup>104</sup> Young, *International Governance*, 73.

arrangements in the Arctic where divisive resolutions to conflicts of principles were successfully avoided and managed in practical ways.

Second, however, the IMO's avoidance of the issue of coastal State jurisdiction raises a question with significance not only to the Polar Code, but also to wider IMO decision-making and international regulations in general. While the IMO successfully avoided conflict, the strategy of avoidance highlights the possibility that other difficult issues could escape resolution or even discussion. The IMO is often accused of aiming for the lowest common denominator, in order to reach consensus among the different members. The IMO's reputation, as well as the judgement of the Polar Code's success, would not be enhanced by such suspicions. This also applies to international regimes and their outcomes in general.

Third, whether the Polar Code indeed will turn out to be a success also depends on its contents: would the Polar Code be deemed sufficient to ensure safety of navigation and protection of the marine environment?<sup>105</sup> If Arctic coastal States are not satisfied with the Polar Code and its implementation, these States could still argue for the right to adopt and enforce more stringent standards than those included in the Code, based on their perceived jurisdiction in article 234. This would negate the purpose of the Code in providing the uniform regulations necessary for international shipping to strive. In this regard, it is important that the tacit acceptance procedure provides a vehicle for the continuous updating and strengthening of the Code, making it less likely that additional unilateral coastal State regulations would be felt needed. It is further encouraging that the IMO is currently considering a second phase for the Code's development.<sup>106</sup>

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<sup>105</sup> On the sufficiency of the Polar Code, see Chircop, "Jurisdiction over Ice-Covered Areas," 284—286.

<sup>106</sup> MSC 98/23, 48—50.

In the growing literature on the future of the Polar Code, different views appear on the relationship between article 234 and the Code. If the aim is harmonisation, coastal State national regulations on the one hand, and GAIRES and the Polar Code on the other, appear to be pointing in opposite directions. In Knut Einar Skodvin's view, the Code alters the legal landscape to the extent that all national regulations in the Arctic which differ from the Code would need to be measured against it to assess whether these pay due regard to navigation and environmental protection.<sup>107</sup> This would mean that the Polar Code "expands" into the competence reserved for coastal States in article 234, in a similar way to that suggested by Ole Kristian Fauchald.<sup>108</sup>

It has also been argued that the Polar Code and national regulations should, rather, be seen as complementary in nature. Thus, the adoption of the Polar Code could possibly lead to increasing coastal State reliance on other, uncontroversial provisions in the LOSC to protect the Arctic environment, such as those applicable to the EEZ in general, while article 234 could still exist as a safety-net.<sup>109</sup> Further, article 234 also provides for enforcement jurisdiction of the coastal State which could prove important in enforcing the Polar Code. Yet another view, put forward by Aldo Chircop, sees a symbiotic relationship between the Code and article 234.<sup>110</sup> Chircop also suggests there are good reasons for Russia and Canada to retain existing unilateral regulations, such as the controversial mandatory reporting requirements.<sup>111</sup>

As highlighted above, whether a coastal State would be satisfied with the Polar Code, depends on the content and the necessary protection provided by the Code. How far do nation

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<sup>107</sup> Skodvin, "Arctic Shipping – Still Icy," 157.

<sup>108</sup> Fauchald, "Regulatory Framework," 82—83.

<sup>109</sup> Jensen, "International Code for Ships," 75—77.

<sup>110</sup> Chircop, "Jurisdiction over Ice-Covered Areas," 283—284.

<sup>111</sup> *Ibid.*, 285.

States go to protect what they see as fundamental principles? Since savings clauses uphold nation States' rights and obligations in other international instruments, if these are not resolved to start with, the savings clauses only perpetuate the ambiguity. The savings clauses, together with the unresolved nature of article 234, provide room for manoeuvre regarding where the line can be drawn between the role of nation States and international regulations in general, and regarding permits and mandatory reporting in particular. It is submitted here that this ambiguity might be preferred by the parties to an outright rejection of principles.

## **Conclusion**

Where does this leave us? Has the IMO achieved nothing with the Polar Code? While the Polar Code does not change the status quo of uncertainty on LOSC article 234, I argue that the Polar Code does matter. Article 234 appears to be subject to endless academic discussions and this will continue in the future. However, in the meantime, a set of globally applicable regulations has been created in the shape of the Polar Code which lead to enhanced safety and more environmentally sound shipping in the Arctic. That this has been achieved in a respectful manner and without discarding any of the underlying principles of the parties means that neither side has lost face or faith in the IMO's decision-making process. The possibility of continued collaboration has not been damaged, either in the IMO or in the Arctic in general, and can lead to continued development of the Polar Code.

As incompletely theorised agreements can lead to practical results without undermining deeply held principles, it seems States favour these to open conflict and the possibility of losing the argument on the basis of main principles, as suggested by Sunstein, especially when time is limited. The Polar Code negotiations on the savings clauses show that States are willing to play by the rules of the game. Neither side in the savings clause debate reverted to justifications based on principles and gave up second-best arguments, despite facing partial defeat.



The Polar Code is an incompletely theorised agreement and this feature could be helpful for further cooperation in the realm of Arctic shipping. It is worth remembering that there are precedents for incompletely theorised agreements in the context of Arctic shipping. It can be argued that article 234 itself is the result of an incompletely theorised agreement as it does not indicate whether the Northwest Passage that prompted the conflict between Canada and the United States – or indeed the Northeast Passage – should be considered in the scope of the international straits regime or the ice-covered waters regime.<sup>112</sup> Furthermore, the 1988 Agreement on Arctic Cooperation between the United States and Canada is often described as an “agreement to disagree,” as it provides for a practical solution for the operation of U.S. icebreakers in waters claimed by Canada, while not prejudicing the legal position of either State.<sup>113</sup> The Polar Code can be seen as a continuation of this tradition: it does not change the underlying conflict of principles, but it encourages safe and environmentally sound Arctic shipping by making it more practicable.

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<sup>112</sup> Bartenstein, “Arctic Exception,” 27.

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